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No. 99-1178

In The

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS VILLAGE OF BARTLETT AND CITIZENS AGAINST THE BALEFILL

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QUESTIONS PRESENTED

Section 404 of the Clean Water Act, 33 U.S.C. § 1344, authorizes the United States Army Corps of Engineers to issue permits for the discharge of dredged or fill materials into "navigable waters," defined by the Act as "waters of the United States * * * ." 33 U.S.C. § 1362(7). In the instant case, the Corps determined that a series of permanent and seasonal ponds and small lakes on petitioner's property are "waters of the United States" because they are used as habitat for numerous species of migratory birds. The questions presented are as follows:

1. Whether the Corps' determination that the waters at issue are subject to its regulatory jurisdiction was based on a permissible construction of the Clean Water Act; and

2. Whether use of the waters as migratory bird habitat is a constitutionally sufficient basis for the exercise of federal regulatory jurisdiction.

RULE 29.6 STATEMENT

This brief is filed on behalf of respondents Village of Bartlett and Citizens Against the Balefill, intervenors below. The Village of Bartlett is an Illinois municipal corporation. Citizens Against the Balefill is a not-for-profit corporation organized under the laws of Illinois. It has no parent corporations, and no publicly held company owns stock in it.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States."

Certain relevant provisions of the Federal Water Pollution Control Act of 1972 ("Clean Water Act") are reproduced at Pet. App. 37a-38a. The relevant regulatory definitions and interpretations are reproduced at Pet. App. 39a-40a.

In addition, the Clean Water Act sets as its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and declares that one goal in achieving that objective is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife * * * ." 33 U.S.C. § 1251.

Section 47(b) of the Water Resources Development Act of 1988, 102 Stat. 4012 (reproduced at AR 38325, included with petitioner's lodging at Tab 3), provides that "Before issuing a permit under section 404 of the [Clean Water Act] for a proposed municipal landfill in the vicinity of Bartlett, Illinois, the Secretary [of the Army] shall consider the impact of such landfill on the Newark Valley Aquifer" and its implications for drinking water, in consultation with the United States Environmental Protection Agency, and "shall report to

Congress on the impact of such landfill on the Newark Valley Aquifer."[1]

STATEMENT OF THE CASE

1. Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the chief goals of the Act is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. § 1311(a), 1362(6) and (12)(A). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Conference Report accompanying the Act explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

[1] "AR" refers to the Administrative Record before the Corps. The Corps' decisions and the report to Congress mandated by the Water Resources Development Act of 1988 are reproduced in petitioner's lodging.

Under certain circumstances, discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers pursuant to Section 404 of the Act, 33 U.S.C. § 1344. The Corps' original regulations limited the geographic scope of the Corps' authority to waters that were navigable-in-fact. After that narrow interpretation was rejected by the courts,[2] the Corps broadened them. The final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The regulation in its current form contains

[2] See, *e.g.*, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *United States v. Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). Shortly after the decision in *Holland*, the House Committee on Government Operations expressed the view that the Corps' regulatory definition of "waters of the United States" was unduly narrow. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that the term be given the broadest possible constitutional interpretation." *Id.* at 27.

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

similar language. See 33 C.F.R. 328.3(a)(3).[4] Regulations promulgated by the Environmental Protection Agency (EPA) include a substantially identical definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the EPA had "clarified that waters of the United States" includes waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. Petitioner Solid Waste Agency of Northern Cook County (SWANCC) is an Illinois municipal corporation. It was initially comprised of 28 municipalities, but its membership later declined to 23 municipalities.

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[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

AR 15577. The site on which SWANCC proposed to put its balefill (a landfill for baled or bundled waste) was a 410-acre parcel in unincorporated Cook County near the towns of Bartlett (respondent herein), Elgin, and South Elgin, Illinois. AR 15573.

The site was a former gravel strip-mining operation that had been abandoned decades earlier, (AR 15691), and has since developed a remarkable natural character. It contains more than 200 ponds totaling over 55 acres (AR 12118), which seasonally form "an extensive labyrinth of open water" (AR 40334), and the Corps found it "difficult to separate the ponds from the wooded ridges, both physically and functionally." AR 17867. The site is a "mosaic of permanent, semi-permanent, and seasonal ponds interspersed with forested ridges" (AR 17867), and an "intermingled forest/open water habitat" (AR 15643), forming a "large, contiguous forested ecosystem" (AR 15691) such that "the entire wooded portion of the site * * * function[s] as a large, forested wetland complex." AR 15579.

In 1986, a SWANCC representative wrote to the Corps, asking whether the site contained protected wetlands. AR 34594. The Corps responded that it had found none, and that a section 404 permit thus would not be required. AR 34596. Similar correspondence – again focused only on the existence of wetlands, not the broader inquiry of "waters of the United States" – was exchanged in early 1987. AR 34598-99, 34609.

In July 1987, the Illinois Nature Preserves Commission (a State agency created by statute, *see* 525 ILCS 30/1 *et seq.*) asked the Corps to assert jurisdiction

over the site. The Commission urged that the Corps did have jurisdiction over the site based on the presence of "waters of the United States" and the use of the site and its waters by migratory birds. AR 34611-13. The Commission wrote:

> The balefill site is not currently being quarried and it meets the definition of waters of the United States as defined in [33 C.F.R.] 328.3 (a) and (b). Brief visit to the site by a member of our staff and a biologist from the Max MacGraw Wildlife Foundation resulted in the observation of a number of migratory bird species, including Wood Duck, Great-blue Heron, Green-backed Heron, and Killdeer. The presence of aquatic vegetation suggests that a more thorough investigation would yield additional wetland birds.
>
> * * * The Corps has been rightfully proud of its sensitivity to environmental concerns, and assuming jurisdiction of this site would be in keeping with this farsighted policy.

AR 34613.

After reviewing this request from the State agency, the Corps concluded in November 1987 that water areas of the site in fact qualified as "waters of the United States," and that a permit would thus be required before those water areas could be filled. The Corps based its determination on three criteria: "(1) that the proposed balefill site has been abandoned as a gravel pit; (2) that the water areas and spoil piles have developed a natural character; and (3) that the water

areas are or could be used as habitat by migratory birds which cross state lines." AR 34619.[5]

In November 1998, Congress passed the Water Resources Development Act of 1988, 102 Stat. 4012. Section 47(b) of that Act provided that "Before issuing a permit under section 404" of the Clean Water Act for the proposed SWANCC landfill, the Secretary of the Army was to consult with the United States Environmental Protection Agency and consider the impact on the Newark Valley Aquifer and on drinking water supplies. While the EPA's initial determination was that the project posed little risk (AR 38317-20), this view changed dramatically during the permitting process, as explained below.

3. SWANCC first applied for a section 404 permit in 1990. On an extensive record, the Corps denied the permit. AR 44682-44573 (tab 2 to petitioner's lodging). The Corps found *inter alia* that the proposed landfill "would eliminate a substantial portion of the existing habitat for a variety of woodland wildlife," including "documented habitat for several state endangered or threatened woodland birds normally associated with aquatic ecosystems," with "significant implications for the maintenance of viable populations of these species

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[5] The Corps also noted that SWANCC's earlier inquiries had been directed only to whether the water areas of the site qualified as wetlands or lakes, not to whether they fulfilled the broader definition of "waters of the United States." AR 34619. Eventually, the Corps concluded that the site indeed does contain actual wetlands. AR 10967-68, 15579, 15642-43, 15691.

in the region or state." AR 44678, 44714. In addition, the Corps found that SWANCC had failed properly to evaluate "many * * * potentially viable alternative sites." AR 44695-700, 44740.

In October 1992, SWANCC reapplied. On an even fuller record, in July 1994 the Corps again denied the permit. AR 15572-15847. The Corps noted that well in excess of 100 bird species were observed on the site, including several known to depend on aquatic environments for a significant portion of their life requirements, and many of which are known to migrate through portions of the United States. AR 15578. The Corps also concluded that the site contained jurisdictional wetlands of greater than one acre. AR 15579.

The Corps also noted the updated recommendation of the United States Environmental Protection Agency, which "recommended that the permit application be denied, based on the determination that the project * * * would have significant adverse impacts to waters of the United States and wildlife, and would pose a long term threat to groundwater resources." AR 15580.

> With regard to state water quality standards * * * the USEPA indicated its concern that the project site is inherently unsuitable for a project of this type due to the hazard of possible groundwater contamination of the Newark Valley Aquifer. They stated that while heroic engineering practices may make the design acceptable, the long-term maintenance requirements of the inward water flow gradient constitute a high risk situation with regard to the aquifer.

AR 15581.

The United States Fish and Wildlife Service likewise requested that the project be denied based on its finding that the site "constitutes a significant habitat for migratory birds * * * ." AR 15581-82. Three State of Illinois agencies, the Illinois Department of Conservation, the Illinois Nature Preserves Commission, and the Illinois Endangered Species Protection Board, expressed grave concerns about possible effects on area water supplies and on state-listed bird species. AR 15585-89.

The Corps noted that while the SWANCC project was supported by some Illinois municipalities (all of which were SWANCC members whose waste would be slated to go to the proposed balefill, and none of which are in close proximity to the site), it was opposed by many neighboring municipalities for a variety of reasons, including threats to the public water supplies and other potential environmental impacts. 15590-91.

4. SWANCC brought suit in federal district court pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, in 1994. The parties then filed cross-motions for summary judgment regarding the propriety of the Corps' assertion of jurisdiction over the site. SWANCC urged that the site was not subject to federal regulatory jurisdiction under the Commerce Clause because, as SWANCC put it, "[b]irds do not conduct commerce, people do." Pet. App. 17a. The district court noted holdings of several Courts of Appeals

upholding the so-called "migratory bird rule," and found that this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), did not place the regulation of intrastate migratory bird habitats beyond the reach of federal commerce clause jurisdiction. The district court noted that this Court in *Lopez* reaffirmed that the commerce clause "authorizes the federal government to regulate activities whose effect on interstate commerce is substantial only in the aggregate." Pet. App. 17a-23a. The court observed that migratory birds "have long been regarded as a proper subject for federal commerce clause regulation." Pet. App. 23a, citing *Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979).

The district court also rejected SWANCC's contention that the migratory bird rule exceeds the Clean Water Act's scope. Noting that the Act was, by its terms, enacted "to restore and maintain the chemical, physical, and biological integrity of this Nation's waters," including "the protection and propagation of fish, shellfish, and wildlife," and that the Act's legislative history likewise reveals Congress' intent to extend jurisdiction over waters to the maximum extent permitted under the Constitution, the district court concluded that 33 C.F.R. § 328.3(a)(3), as applied to intrastate migratory bird habitats, constituted a reasonable construction of the Clean Water Act. Pet. App. 29a-30a.

Upon the district court's grant of summary judgment on the jurisdictional point, SWANCC voluntarily dismissed the remainder of its suit in order to obtain a final judgment from which to appeal. Accordingly, as the court of appeals noted, "SWANCC has abandoned its challenge to the merits of the Corps' decisions and

has instead focused exclusively on its challenge to the migratory bird rule as a basis for the Corps' jurisdiction." Pet. App. 4a-5a. Thus SWANCC comes to this Court after having admitted for purposes of this case that the waters on this site constitute significant habitat for migratory birds, as well as that SWANCC's proposed landfill posed unacceptable risks for area groundwater.

The court of appeals affirmed the district court's jurisdictional finding. Pet. App. 1a-13a. The court rejected SWANCC's constitutional challenge, stressing that *Lopez* "expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a. The court noted that more than 3 million Americans spend more than a billion dollars annually to hunt migratory birds, with hundreds of thousands of those people crossing state lines to do so, and that many more millions of Americans engaged in interstate travel to observe birds. The court concluded:

> There is no need to dally on this point: we find (once again) that the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding

> is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Pet. App. 7a.

The court of appeals rejected SWANCC's argument that migratory bird habitat is of solely local interest, finding the argument "refuted by the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds, *North Dakota v. United States*, 460 U.S. 300, 309 (1983); see also *State of Missouri v. Holland*, 252 U.S. 416 (1920)." Pet. App. 8a.

The court of appeals also rejected SWANCC's argument that Corps jurisdiction based on migratory bird habitat exceeded Congress' grant of authority in the Clean Water Act. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." Pet. App. 9a. The court distinguished *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), where the court considered § 328(a)(3)'s application to waters whose degradation "could" affect interstate or foreign commerce. The court of appeals here found that the regulatory authority at issue was not based on *potential* impact on interstate commerce, but was instead founded on unchallenged facts (facts as to which SWANCC has abandoned any challenge) showing "an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a.

SUMMARY OF ARGUMENT

This case comes to the Court upon undisputed findings that the site at issue is of significant ecological value, that it acts as an actual habitat for several species of migratory birds, and that petitioner's proposed balefill would have significant effects on those birds, the ecosystem and the drinking water supply for neighboring communities, as expressed by federal and State agencies. It is on this basis that the Corps found, and the courts below confirmed, that these are "waters of the United States" within the meaning of the Clean Water Act, and that this application of the Act is well within the contours of the commerce power under this Court's teachings. These conclusions are unquestionably correct.

Both the express language and the legislative history of the Clean Water Act make clear that "navigable waters of the United States," defined by Congress to mean "waters of the United States," is intended to encompass far more than waters that are navigable-in-fact, and is intended to exercise the full reach of Congress' Commerce Clause power. The Corps' regulation providing that "waters of the United States" includes "other waters" whose "use, degradation or destruction" could affect interstate commerce, and the Corps' interpretation of that regulation to apply to waters that are used as habitat by birds that cross state lines or are protected by Migratory Bird Treaties is, at the least, a reasonable interpretation of Congress' directive, and one for which the agencies charged with the statute's administration are entitled to *Chevron* deference.

Moreover, in this case, Congress passed a specific statute, *after* the Corps determined that it had jurisdiction over the SWANCC site, directing the Corps to undertake certain analysis before deciding whether to grant a permit for that site under section 404 of the Clean Water Act. At a minimum, this demonstrates tacit Congressional approval of the assertion of Clean Water Act jurisdiction over this site.

The courts below were correct to find that the assertion of jurisdiction over petitioner's site was proper under the Commerce Clause. Migratory birds undisputably account for a significant measure of interstate commerce, and it is likewise undisputed that the deterioration of various isolated *intra*state waters that serve as migratory bird habitats can have devastating impacts on their ability to survive. Accordingly, protecting against the destruction of migratory bird habitats constitutes the regulation of intrastate activity that, viewed cumulatively, has a substantial impact on interstate commerce.

Perhaps more importantly, what is being regulated here is not the birds themselves, but the activities which threaten to harm those birds. Those activities are predominantly economic in nature, as can be seen from the legions of commercial organizations lined up as *amici* for petitioner. Those activities constitute "commerce" in even the narrowest sense of the word, and their impact on interstate commerce cannot reasonably be called into question.

Moreover, migratory birds that cross state lines, which have long been recognized as a proper subject for

federal statutes and treaties, are themselves things in commerce. This provides yet another basis for the proper application of Congress' powers under the Commerce Clause.

ARGUMENT

1. The Corps' Determination That the Waters on Petitioner's Site Are "Waters of the United States" Within the Meaning of the Clean Water Act Was Reasonable and Correct.

Petitioner's challenge to the intended scope of the Clean Water Act has already been answered in large part by this Court's unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). There, as here, a party sought to develop a parcel of property that did not contain "navigable waters" in the traditional understanding of the phrase. And there, as here, the party challenged the regulatory construction of "waters of the United States," which is the definition of "navigable waters" in the Clean Water Act.

The Court began by noting that the Corps' construction of the Act "is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." 474 U.S. at 131. Accordingly, the Court's role is simply to determine whether the Corps' interpretation "is reasonable, in light of the language, policies and legislative history of the Act * * * ." *Ibid.*

The Act, as made clear in its express wording, constituted "a comprehensive legislative attempt 'to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Ibid.* at 143, quoting 33 U.S.C. § 1251. Congress' objective "incorporated a broad, systemic view of the goal of maintaining and improving water quality," one that recognized the need for "broad federal authority to control pollution * * * ." *Ibid.*

Congress explicitly "chose to define the waters covered by the Act broadly." And the fact that Congress defined "navigable waters" as "waters of the United States" makes clear "that the term 'navigable' as used in the Act is of limited import." *Ibid.* at 133.

> In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."

Ibid. at 133.

Riverside Bayview likewise demonstrates the support for this broad construction in the Act's legislative history. Even more strikingly, it demonstrates that Congress considered opposition to the Act's broad jurisdictional grant in 1977, specifically debated cutting back on that grant, and then chose to retain the existing definition. *Ibid.* at 136-37. As Senator Baker reported in the Conference Committee's report, the legislation "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water

Pollution Control Act." *Ibid.* at 137, quoting 123 Cong. Rec. 29309.[6]

Petitioner brushes aside *Riverside Bayview*, and persists in its claim that because "waters of the United States" is a definition of "navigable waters of the United States," the Corps has impermissibly "written the term 'navigable waters' out of the Act" (Pet. Br. 14) and in doing so violated the "cardinal principle" that all words in a statute be given operative effect (Pet. Br. 17). Petitioner likewise claims that, contrary to *Riverside Bayview*'s holding, the Corps' interpretation of the Act is *not* entitled to judicial deference, since it raises constitutional questions and intrudes on traditional state powers. These arguments are all misplaced, and will be addressed in turn.

A. The Fact That "Navigable Waters" Is Defined to Be Broader than the Phrase's Traditional Understanding Supports the Corps' Interpretation.

Petitioner contends that "waters of the United States" cannot override "navigable waters of the United

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[6] If there were room for doubt on Congress' intent as to the application of the Act generally, there remains the fact that Congress, in passing the Water Resources Development Act of 1988, 102 Stat. 4012, specifically instructed the Secretary of the Army (a full year after the Corps asserted jurisdiction) to undertake certain studies "[b]efore issuing a permit under section 404" of the Act *for this site*. At a minimum, this is compelling evidence that Congress was untroubled by the Corps' assertion of jurisdiction over this site.

States," because the former phrase "is used to *define* the term 'navigable waters.'" Pet. Br. 16 (emphasis in original).

Implicit in petitioner's argument is either (1) that a statutory definition of a statutory term cannot trump the traditional understanding of the term defined; or (2) that a statutory definition of a statutory term cannot be *broader* than the term defined. Either way, petitioner is wrong. This Court has held on many occasions that a term defined in a statute must not be construed contrary to the definition. *See, e.g., Meese v. Keene*, 481 U.S. 465, 484-85 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"). Moreover, this rule has frequently been applied where the definition is broader than the traditional understanding of the term being defined. In *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947), the Court found that the term "employees" as defined in the Fair Labor Standards Act was broader than its traditional legal understanding, since that Act "contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." Likewise, in *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935), Standard Oil complained that its filling stations could not constitute "stores" as commonly understood, even though the term "store" was defined broadly in the statute at issue. Justice Cardozo wrote for the Court:

> We are told that the average man, if requested to point out to a stranger the store nearest

> by * * * , would not be likely to think of a filling station as within the range of the inquiry. There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, it has * * * suppl[ied] its own glossary. * * * In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.

294 U.S. at 95-96 (footnote and citations omitted).

The Corps' reliance on Congress' definition of "navigable waters," rather than on some other understanding, is plainly correct, and it is petitioner's contrary position that does violence to fundamental rules of construction.

B. The Corps' Interpretation of the Act Is Not Deprived of its Entitlement to Judicial Deference by the Doctrine of Constitutional Doubt.

This Court ruled in *Riverside Bayview* that under *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985), and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), its review of the Corps' interpretation of the Clean Water Act is "limited to the question whether [that interpretation] is reasonable, in

light of the language, policies, and legislative history of the Act * * * ." 474 U.S. at 131. And the Court so held after refuting the court of appeals' position "that the Corps' regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment." *Ibid.* at 126.

Notwithstanding *Riverside Bayview*, petitioner argues that deference is inappropriate because of another rule of construction, that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of the Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[7] Petitioner's attempt to apply this "constitutional doubt" rule in this case suffers from two problems: First, as the court of appeals determined, and as demonstrated further below, the Corps' application of the Act *does not* raise serious constitutional problems, and the Corps' exercise of regulatory jurisdiction here is well supported by Commerce Clause rulings from this Court dating back to the nineteenth century.

Second, the "constitutional problems," such as they are, cannot be avoided where the statutory construction urged "is plainly contrary to the intent of Congress."

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[7] The doctrine is one of avoidance that "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears to uphold the Constitution." *DeBartolo*, 485 U.S. at 575.

DeBartolo, 485 U.S. at 575. Thus a doctrine designed to avoid *unnecessary* constitutional adjudications cannot readily be applied where the statute, by its terms and its history, was intended by Congress to extend federal jurisdiction as far as the Constitution permits. The Conference Report accompanying the Act explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972); *see also Riverside Bayview*, 474 U.S. at 137 (noting legislative history that the Act as amended in 1977 retained "comprehensive jurisdiction over the Nation's waters"). *See* Pet. App. 9a (court of appeals finding it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows"); *Leslie Salt Co. v. United States,* 896 F.2d 354, 357 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1126 (1991).

If one accepts that Congress intended to exercise the full extent of its Commerce Clause powers (as the statute, its legislative history and court authority confirm), then it would do violence to Congress' intent to hold that anytime a substantial question is raised about the constitutionality of a particular application, the statute must be interpreted so as to *avoid* the question; one cannot give effect to Congress' intent to *exercise* its most comprehensive powers by automatically answering every close question about the extent of those powers in the negative. And in fact, when this Court has concluded that Congress intended to exercise its full power under the Commerce Clause, it has not

shrunk from the task of determining whether a particular application of federal authority exceeds that power. *See Russell v. United States*, 471 U.S. 858, 859-62 (1985) (unanimous holding that federal arson statute, by which Congress intended to exercise its full power under the Commerce Clause, was properly applied to apartment unit made available for local rental); *Andrus v. Allard*, 444 U.S. 51, 55-57 & n.4 (1979) (regulations promulgated by Secretary of Interior applying Eagle Protection Act and Migratory Bird Treaty Act found proper in light of statutes' "broad proscriptive provisions" and legislative history, despite Court's explicit finding that the regulations raised a substantial issue under the Fifth Amendment).

2. The Regulation of Intrastate Waters Used as Migratory Bird Habitat is Within Congress' Power Under the Commerce Clause.

There is no dispute that petitioner's site in fact serves as habitat for many species of migratory birds.[8] (Nor could it be disputed, since petitioner voluntarily dismissed its challenge to the issue in order to take its appeal.) There is likewise no dispute that the very existence of migratory birds that engage in interstate

[8] Accordingly, this case, involving actual birds in actual habitats, is unlike the one described in Justice Thomas' dissent from the denial of *certiorari* in *Cargill, Inc. v. United States*, 516 U.S. 955, 955-96 (1995) (describing jurisdiction premised solely on "the actual or potential presence" of such birds); *ibid.* at 956-97 (questioning whether "potential or actual existence" of migratory birds could give rise to jurisdiction); *ibid.* at 958 (jurisdiction over "any waters that might serve as a potential habitat").

travel is profoundly threatened by the degradation of habitat, the bulk of which exists within individual states. *See State of Missouri v. Holland*, 252 U.S. 416, 435 (1920) (in light of migratory birds' transitory presence within individual States, "It is not sufficient to rely upon the States").

The question, then, is whether the commerce power is exceeded where petitioner, which is seeking to engage in commercial activity, is regulated when its proposed activity threatens wildlife that travels interstate, despite the fact that Congress has acted to protect wildlife, and despite the fact that human activities devoted to the threatened wildlife add up to more than a billion dollars of commerce each year, much of it spent by people who themselves travel interstate to engage in those activities.[9]

It is, respectfully, difficult to miss the commerce in this picture. While petitioner and supporting *amici* apparently hope that *Morrison v. United States*, 120 S. Ct. 1740 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), portend a radical departure from this Court's established Commerce Clause jurisprudence, the federal authority being exercised here was well

[9] It is clear that the operation of landfills (the bulk of whose contents undoubtedly moved in interstate commerce) constitutes "commerce" under virtually any definition of the term, and is well within Congress' power to regulate. *See, e.g., Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994); *United States v. Rogers*, 685 F. Supp. 201 (D. Minn. 1987) (upholding Resource Conservation and Recovery Act against Commerce Clause challenge).

within the bounds of the commerce power as described in *Morrison* and in *Lopez*.

As the Court stated in *Morrison*, modern Commerce Clause jurisprudence has identified "three broad categories of activity that Congress may regulate under its commerce power." 120 S. Ct. at 1749. Congress may regulate (1) the channels of interstate commerce, (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce, * * * *i.e.*, those activities that substantially affect interstate commerce." *Ibid.* at 1749 (internal quotations omitted; ellipses in *Morrison).*

Any way one frames this – in view of the birds (wildlife that itself travels interstate), the people who travel interstate to observe and hunt those birds, the dollars those people spend in pursuit of those birds, the commercial activity in which petitioner wishes to engage, or the national scope of the environmental evils that Congress chose to address (and address in a manner giving due recognition to the delicate and intertwined nature of ecosystems, *see Riverside Bayview*, 474 U.S. at 132-33) – it fits comfortably within this Court's Commerce Clause jurisprudence.

A. Migratory Birds Generate Significant Interstate Commercial Expenditures, and Protecting That Commerce Requires the Regulation of Intrastate Activity.

As the court of appeals noted, *Lopez* "expressly recognized, and in no way disapproved, the cumulative

impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." Pet. App. 6a. The same is clearly true for *Morrison*.

We will not belabor this Court with another iteration of the court of appeals' holding. It will suffice to note that it is unchallenged that millions of interstate travelers spend more than a billion dollars annually to hunt or observe migratory birds. Protecting the focus of that commerce must surely be within Congress' power to regulate "those activities having a substantial relation to interstate commerce." *Morrison*, 120 S. Ct. at 1749.

B. The Fact That the Migratory Birds Being Protected Themselves Engage in Interstate Travel Is an Independent Basis for Their Protection under Congress' Commerce Power.

Morrison reaffirmed that Congress' commerce power extends to the regulation of "persons or things in interstate commerce, even though the threat may come only from intrastate activities." 120 S. Ct. at 1749.

Migratory birds, by definition, routinely transport themselves across state lines. Moreover, "it is settled beyond question that the transportation of persons [across state lines] is 'commerce' within the meaning of" the Commerce Clause. *Edwards v. California*, 314 U.S. 160, 172 (1941); *see also Camps Newfound/Owatonna v.*

Harrison, Maine, 520 U.S. 564, 584 (1997). It has likewise been held "immaterial whether or not the transportation is commercial in character." *Edwards*, 314 U.S. at 172 n.1. *See United States v. Wright*, 128 F.3d 1274, 1275 (8th Cir. 1997) ("the Supreme Court has repeatedly said crossing state lines is interstate commerce regardless of whether any commercial activity is involved"), *cert. denied*, 523 U.S. 1053 (1998). Accordingly, migratory birds are "things in interstate commerce," and, like people in interstate commerce, their protection is within Congress' commerce power. *See United States v. Bailey*, 115 F.3d 1222, 1228 (5th Cir. 1997) (upholding Child Support Recovery Act, finding that child support obligation for out-of-state child is "itself a thing of commerce that has acquired an interstate character"), *cert. denied*, 522 U.S. 1082 (1998); *accord United States v. Black*, 125 F.3d 454, 460 (7th Cir. 1997) ("[t]hat a support obligation is intangible and that payments under it may only amount to a transfer of electrons across state lines is immaterial"), *cert. denied*, 523 U.S. 1033, 1130 (1998).

C. The Commerce Clause Permits Congress to Address Matters of Uniquely National Concern, and the Matters Regulated Here Are Predominantly Commercial.

Petitioner argues that the activity proscribed by the Clean Water Act – adding a "pollutant" (including fill material) – into water is not "inherently economic or commercial." Pet. Br. 37. Petitioner criticizes the Corps for noting that the prevention of harms to migratory birds has long been an issue of national concern (Pet. Br. 38), concluding, rather flippantly, "The last time we

checked, there was no 'national concern' clause in the Constitution." Pet. Br. 39.

No, there is no "national concern" clause, but this Court has long worked to ensure – out of concern for the nation, no doubt – that when Congress reasonably determines that non-economic issues can be effectively addressed only at the national level, those determinations are not judicially overruled based on a crabbed reading of the Commerce Clause.

Virtually no act of pollution is "*inherently* economic or commercial," and yet this Court has held unanimously that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Mining & Reclam. Assoc., Inc.*, 452 U.S. 264, 282 (1981).[10]

Nor do environmental concerns constitute the only area in which it has long been accepted that Congress has the power to regulate activities that may not always be economically motivated, but that logic and history suggest must be handled at the national level. The Commerce Clause constitutes "a positive power. It is the power to legislate concerning transactions which,

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[10] While the activity being regulated in *Hodel* – the aftermath of strip-mining – involved the production of coal, a commodity that moves in interstate commerce, the same can be said for the waste that SWANCC would like to dump on the site. Moreover, the Court's conclusion that the Commerce Clause gives Congress the power to regulate activities that may cause environmental hazards in more than one State was an independent ground for its holding.

reaching across state boundaries, affect the people of more states than one; to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552 (1944). Thus we have the Child Support Recovery Act, 18 U.S.C. § 228, regulating the non-payment of interstate child support obligations, *see United States v. Black*, 125 F.3d 454 (7th Cir. 1997), as well as federal laws to govern crossing state lines with the intent to disrupt an animal enterprise, 18 U.S.C. § 43, to avoid state-court prosecution, 18 U.S.C. § 1073, in aid of unlawful activity, 18 U.S.C. § 1952, with the intent to start a riot, 18 U.S.C. § 2101, or to engage in a sexual act with a minor, 18 U.S.C. § 2423(b), *see United States v. Wright*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 523 U.S. 1053 (1998). And thus, as noted in *United States v. Bailey*, 115 F.3d 1222, 1228 n.7 (5th Cir. 1997), this Court has held "that it is interstate commerce to transport a woman from one state to another in a common carrier, *Hoke v. United States*, 227 U.S. 308, 320-23 (1913); to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States v. Simpson*, 252 U.S. 465, 467 (1920); and to transmit information over interstate telegraph lines, *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. (6 Otto) 1, 11 (1877)." The Court has also held that the Associated Press' not-for-profit newsgathering activities constituted "commercial intercourse * * * within the meaning of the Constitution." *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937) cited in *Bailey*, 115 F.3d at 1228.

Few if any of these activities are "inherently" economic (although, like petitioner's proposed discharge of pollutants into waters, they are economic in many instances), and yet all have been viewed as proper subjects of Congress' commerce power. Moreover, inquiring whether an issue is of uniquely national concern is simply another way of inquiring "whether the exercise of national power seeks to intrude upon an area of traditional state concern," which has been seen as a legitimate basis for evaluating the scope of the commerce power. *Lopez*, 514 U.S. 549, 580 (Kennedy, J., concurring). And the protection of migratory birds, like the protection of the environment more generally, has long been recognized as "a national interest of very nearly the first magnitude * * * ." *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920).[11]

Finally, petitioner's complaint that discharging into waters as defined in the Clean Water Act is not *inherently* economic does not do much to disguise that what is regulated under section 404 of the Act is *predominantly* economic.

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[11] The migratory bird "is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States." *Ibid*. *See also North Dakota v. United States*, 460 U.S. 300, 309-310 (noting treaties that obligate the United States to preserve and protect migratory birds and their habitats).

This is, as is often true in environmental policy disputes, a case involving the balance between preserving the environment and exploiting it for commercial purposes. It is not our goal to assert here, nor is it this Court's role to decide, how that balance should be drawn, since doing so is plainly a legislative judgment. But just as it is said that you can tell a lot about a person by the friends he keeps, you can tell a lot about petitioner's case by the *amici* it attracts. One need only review the long list of *amici* supporting petitioner – a list including mining and quarrying interests, steel and wood producers, homebuilding interests, cattle-marketing interests, farming interests, and the aptly named Chamber of Commerce of the United States of America – to recognize that what is at issue here is commerce on a national level.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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